APPENDIX

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

Court of Appeal - Second Dist.
FILED
Dec 18 1998
Joseph A. Lane, Clerk

Deputy Clerk

PACIFIC BELL,
Petitioner,
v.
The Superior Court of Los Angeles County,
Respondent.

JOHN ALLISON, et al.,
Real Parties in Interest.

B124873 (Super. Ct. No. PC010838)
(Jerold A. Krieger, Judge)

ORIGINAL PROCEEDING. Petition for writ of mandate denied.

Pacific Telesis Legal Group, Gleam O. Davis, Carpenter & Rothans, Martin L. Carpenter and Nancy P. Doumanian, for Petitioner.

No appearance for Respondent.

Mazursky, Schwartz & Angelo, Christopher E. Angelo and Anthony Kornarens, for Real Party in Interest.

Petitioner, Pacific Bell, a defendant in a personal injury action filed by John and Renee Allison (plaintiffs), seeks a writ of mandate directing respondent court to grant its motion for summary judgment based on a limitation of liability provision in one of its tariffs on file with the Public Utilities Commission (PUC). That tariff limits Pacific Bell's liability for damages "arising out of mistakes, omissions, interruptions, delays, errors or defects in any of the services or facilities furnished by the Utility" to a credit allowance not exceeding its charges to the customer for the applicable billing period. Plaintiffs' claim in this case is based upon Pacific Bell's placement of an incorrect address on a pay telephone from which plaintiffs dialed "9-1-1." Since plaintiffs were not charged for the 9-1-1 call, Pacific Bell contends plaintiffs are not entitled to collect any damages.

The applicable tariff does permit claims based upon gross negligence, but limits the recoverable damages to $10,000. We hold that although the tariff bars plaintiffs' claims to the extent they are based on ordinary negligence plaintiffs have presented sufficient facts to create a triable issue of facts as to whether Pacific Bell was grossly negligent. Because plaintiffs have a potential recovery of $10,000, Pacific Bell is not entitled to summary judgment.

FACTS AND PROCEDURAL HISTORY

On September 13, 1992, plaintiff John Allison either dove or fell into the shallow end of a swimming pool at his condominium complex, Rainbow Glen Estates. Mr. Allison struck his head on the concrete pool and was rendered a quadriplegic.

When Mr. Allison was injured, one of his companions called "9-1-1" from a Pacific Bell pay phone installed at the condominium's pool and recreation area. According to plaintiffs, when Pacific Bell installed the wiring for the pay phone two years prior to the accident, it backtracked the wire to determine its point of origin, which was one of the model homes at the complex. The address which Pacific Bell affixed to the pay phone and input into the 9-1-1 emergency data base was the address of the model home, 20815 Greenjay Place, and not the address of the pool and recreation area, 26815 Rainbow Glen Drive. Pacific Bell collected coins from the pay phone on several occasions, but never changed the address posted on the phone. Thus, emergency medical personnel could not locate Mr. Allison because, although they responded promptly to the 9-1-1 call, they went to the wrong address. Mrs. Allison, her daughter and others at the pool complex could hear the sirens and see the flashing lights on the paramedic ambulance as it went up and down other streets at the complex. Finally, someone from the group went and flagged down the ambulance. Mr. Allison did not received medical attention until 35 to 45 minutes after the accident; plaintiffs contend the delay exacerbated his injuries because during the period of delay, a jagged portion of Mr. Allison's cervical spine was allowed "to repeatedly traumatize his spinal cord."

Settlements and pretrial motions have reduced the number of defendants in this case to two, Pacific Bell and Warmington Homes, the condominium developer.

In November 1997, Pacific Bell filed a motion for summary judgment or, in the alternative, summary adjudication of issues. In January 1998, respondent

court granted the motion for summary adjudication as to plaintiffs' causes of action for product liability, public nuisance, breach of implied warranty, and strict liability in tort. Plaintiffs' claims against Pacific Bell for loss of consortium and negligence remained. The case was set for trial on August 24, 1998.

On July 28, 1998, Division One of this court issued its opinion in *Los Angeles Cellular Telephone Co. v. Superior Court* (1998) 65 Cal.App.4th 1013 (rev. den. 10/21/98) ("L.A. Cellular"). In that case, the plaintiff sued L.A. Cellular because she could not get a "9-1-1" connection from her cellular phone and was therefore unable to summon help as she was being pursued by two attackers, one of whom shot her in the face. L.A. Cellular's tariff on file with the Public Utilities Commission (PUC) contained a provision limiting L.A. Cellular's liability for negligence resulting from an "interruption in service" to $5,000. Division One issued a writ of mandate directing the superior court to grant L.A. Cellular's motion for summary adjudication of one of its affirmative defenses, thus limiting plaintiff's recovery to the $5,000 provided for in the tariff.

On or about August 3, 1998, Pacific Bell, relying on *L.A. Cellular*, filed a motion for reconsideration of the January 1998, order denying its motion for summary judgment. In opposition to the motion, plaintiffs distinguished *L.A. Cellular*, arguing that their claims were not based upon an "interruption in service" but upon independent acts of negligence not within the tariff's purview.

On August 20, 1998, respondent court granted the motion for reconsideration, but denied the motion for summary judgment, finding that "the PUC tariff is not an absolute defense." The court commented at the

hearing below, "Even if the telephone company, under the regulation or the tariff, were excused from its mistake in having the wrong number, does that excuse the subsequent negligence of workers for Pacific Bell in not correcting the mistake? Because that seems to me to be a separate act of negligence that is not included within the tariff."

Pacific Bell filed this petition on August 24, 1998, the trial date. We issued an alternative writ of mandate and stayed the trial as to Pacific Bell only. Respondent court did not comply with the alternative writ.

DISCUSSION

As a public utility, Pacific Bell is regulated by the PUC. The PUC has the power to "supervise and regulate every public utility in the State" (Pub. Util. Code, § 701) and "is specifically empowered to require utilities to file tariff schedules containing rates, charges and classifications, 'together with all rules, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rentals, classifications, or service.' ([Pub. Util. Code,] § 489.)" (*Waters v. Pacific Telephone Co.* (1974) 12 Cal.3d 1, 6.) These schedules, or "tariffs," have the force and effect of a statute. (*Dyke Water Co. v. Public Utilities Com.* (1961) 56 Cal.2d 105, 123.) A tariff, including a limitation of liability provision, is binding on the utility's customers, whether or not they are aware of the tariff's provisions. (*Trammel v. Western Union Tel. Co.* (1976) 57 Cal.App.3d 538, 551-552.) "The subject of limitations upon liability of telephone utilities has long been considered to be a proper subject for [PUC] regulation and supervision, . . ." (*Waters, supra*, 12

Cal.3d at p. 6.) "'The theory underlying these decisions is that a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges, shall likewise be regulated and limited as to its liabilities . . . . Reasonable rates are in part dependent upon such a rule.'" (*Id.* At p. 7, citing *Cole v. Pacific Tel. & Tel. Co.* (1950) 12 Cal.App.2d 416, 419.)

Pacific Bell filed its A2 tariff on May 10, 1983. Rule 14 of the A2 tariff provides in pertinent part:

> "2.1.14 RULE NO. 14 - LIMITATION OF LIABILITY
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> "A. LIMITATIONS
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> "1. The provisions of this rule do not apply to errors and omissions caused by willful misconduct, fraudulent conduct, or violations of law.
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> "2. In the event an error or omission is caused by the gross negligence of the Utility, the liability of the Utility shall be limited to and in no event exceed the sum of $10,000.
>
> "3. The utility will not provide a credit allowance for interruptions of service caused by the customer's facilities, equipment, or systems.
>
> "4. Except as provided in A3 of this rule, the liability of the Utility for damages arising out of *mistakes, omissions, interruptions, delays, errors or defects in any of the services or facilities furnished by the Utility up to and including its local loop demarcation point, including exchange, toll, private line, supplemental equipment, alphabetical directory listings (excluding the use of bold face type) and all other services*, shall in no event exceed an amount equal to the pro rata charges to the

> customer for the period during which the services or facilities are affected by the mistake, omission, interruption, delay, error or defect, . . . [I]n no event shall the liability exceed the total amount of the charges to the customer for all services or facilities for the period affected by the mistake, omissions, interruption, delay, error or defect." (Emphasis added.)[1]

The A2 tariff limits plaintiffs' claims to the extent they are based on ordinary negligence.

Plaintiffs contend that the A2 tariff limits negligence claims only if they are based upon an interruption in telephone service; it does not limit other claims based upon ordinary negligence. To support their argument, plaintiffs cite a number of cases in which injured parties were entitled to pursue negligence claims against Pacific Bell or its predecessor, Pacific Telephone. (See, e.g., *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49 [third party driver struck negligently placed telephone booth]; *Roulston v. Pacific Tel. & Tel. Co.* (1979) 96 Cal.App.3d 149 [plaintiff injured by negligently driven Pacific Telephone truck]; *Elder v. Pacific Tel. & Tel. Co.* (1977) 66 Cal.App.3d 650 [workman injured at Pacific Telephone construction site].)

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[1]The limitation of liability provision also covers 9-1-1 calls. Section 3 B3 of the PUC's A9 tariff, dealing with 9-1-1 service, provides: "The Utility's liability to 9-1-1 customers and third parties utilizing the 9-1-1 service is set forth in Schedule Cal. P.U.C. No. A2.1.14." For purposes of 9-1-1 service, the "customer" is the political subdivision or municipal corporation which places an order for 9-1-1 emergency service. (Schedule Cal. P.U.C. No. A9, 3rd Revised Sheet 224, filed March 7, 1990.)

Both parties have focused their arguments on whether their was an "interruption in services," as in *L.A. Cellular*. However, the appropriate inquiry is whether plaintiffs' negligence claims are based upon the rendition of "any of the services or facilities furnished" by Pacific Bell. The negligence cases cited by plaintiffs do not involve the provision of telephone services. Other cases, however, have upheld the tariff's limitation of liability provisions where, for example, the Pacific Bell's predecessor failed to provide *adequate* telephone service (*Waters, supra*) or omitted plaintiff's ad from the "Yellow Pages" (*Davidian v. pacific Tel. & Tel. Co.* (1971) 16 Cal.App.3d 750). Since the placing of an address on a pay telephone is one of the "services or facilities furnished" by Pacific Bell, plaintiffs' damages are limited by the "credit allowance" provisions of the A2 tariff. In plaintiffs' case, the damages are zero because 9-1-1 service is provided at no cost to the caller.

There are triable issues of fact on the issue of gross negligence.

A claim based upon *gross* negligence is a specific exception to the A2 tariff. (*Colich & Sons v. Pacific Bell* (1988) 198 Cal.App.3d 1225, 1240). The distinction between ordinary and gross negligence "amounts to a rule of policy that a failure to exercise due care in those situations where the risk of harm is great will give rise to legal consequences harsher than those arising from negligence in less hazardous situations." (*Ibid*, citing *Donnelly v. Southern Pac. Co.* (1941) 18 Cal.2d 863, 871.)

In this case, Pacific Bell placed an incorrect address on a pay telephone in a swimming pool and recreation area, a place where the odds of an accident

occurring are greater than normal. That being the case, the accuracy of the address information on the telephone is particularly significant. Plaintiffs presented evidence in opposition to Pacific Bell's motion that Pacific Bell knew the address on the telephone was inaccurate and failed to correct the mistake, despite the fact that its technicians visited the site on a number of occasions to collect coins from the phone. Pacific Bell has also admitted that when the address on a particular telephone does not match the phone's location, the coin collector is supposed to notify Pacific Bell's business office. That was not done in this case. Pacific Bell also knew that the telephone would be linked to the 9-1-1 system, making it imperative that the telephone reflect the premises' correct address.

"Whether there has been such a lack of care as to constitute gross negligence is generally a triable question of act." (*Colich & Sons v. Pacific Bell, supra,* 198 Cal.App.3d at p. 1241.) The evidence presented by plaintiffs in opposition to the summary judgment motion was sufficient to create a triable issue of fact as to whether Pacific Bell was grossly negligent when it failed to insure the accuracy of the address on the pool area pay phone.[2]

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[2]On the facts presented, Pacific Bell's failure to correct the address does not, as plaintiffs contend, rise to the level of willful misconduct. Nor are we persuaded by plaintiffs' contention that the $10,000 damage limitation in the tariff is an unconstitutional limitation on their right to due process. (See *Waters, supra,* 12 Cal.3d at pp. 6-7.)

CONCLUSION

Rule 14 of the A2 tariff limits damage claims arising out of "mistakes, omissions, interruptions, delays, errors or defects in any of the services or facilities furnished by" Pacific Bell to the cost of the service provided. By its terms, the tariff applies to the posting of the premises address on a pay telephone, one of the "services or facilities furnished by" Pacific Bell. If Pacific Bell's failure to insure that the pay telephone bore the correct address is ordinary negligence, plaintiffs' damages are limited to zero, the cost of the service provided.

However, if Pacific Bell's conduct amounts to gross negligence, plaintiffs may recover up to $10,000, the "cap" amount set forth in the tariff. Because there are triable issues of fact as to whether Pacific Bell was grossly negligent, it is not entitled to summary judgment.

DISPOSITION

The petition for writ of mandate is denied. Plaintiffs are to recover their costs of this proceeding.

ARMSTRONG, J.

We concur:

TURNER, P.J. GODOY PEREZ, J.

Second Appellate District, Division Five, No. B124873
S076188

IN THE SUPREME COURT OF CALIFORNIA

Supreme Court
FILED
March 9, 1999
Robert Wandruff, Clerk

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Deputy

PACIFIC BELL,
Petitioner
v.
Los Angeles County Superior Court,
Respondent.

JOHN ALLISON et al.,
Real Parties in Interest

Real Parties In Interest's petition for review DENIED.
Mosk, J., is of the opinion the petition should be granted.
Werdegar, J., did not participate.

George
Chief Justice

Public Utilities Code § 1759. Jurisdiction

No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation therefore, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

Public Utilities Code § 2106. Liability for damage or injury caused by violation; exemplary damages; effect of recovery on rights of state

Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

No recovery as provided in this section shall in any manner affect a recovery by the State of the penalties provided in this part or the exercise by the commission of its power to punish for contempt.

Cal. Const. Art. XII, § 1. Commission; membership vacancies; removal

Section 1. The Public Utilities Commission consists of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for staggered 6-year terms. A vacancy is filled for the remainder of the term. The Legislature may remove a member for incompetence, neglect of duty, or corruption, two thirds of the membership of each house concurring.

Cal. Const. Art. XII, § 2. Establishment of procedures; hearings, investigations, issuance of orders

Sec. 2. Subject to statute and due process, the commission may establish its own procedures. Any commissioner as designated by the commission may hold a hearing or investigation or issue an order subject to commission approval.

Cal. Const. Art. XII, § 3. Classification; control by legislature; additional classes

Sec. 3. Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities.

Cal. Const. Art. XII, § 4. Transportation of passengers and property; rates; rules; increases

Sec. 4. The commission may fix rates and establish rules for the transportation of passengers and property by transportation companies, prohibit discrimination, and award reparation for the exaction of unreasonable, excessive, or discriminatory charges. A transportation company may not raise a rate or incidental charge except after a showing to and a decision by the commission that the increase is justified, and this decision shall not be subject to judicial review except as to whether confiscation of property will result.

Cal. Const. Art. XII, § 5. Additional authority and jurisdiction of commission; review; eminent domain

Sec. 5. The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record and to enable it to fix just compensation for utility property taken by eminent domain.

Cal. Const. Art. XII, § 6. Duties of commission

Sec. 6. The commission may fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.

Cal. Const. Art. XII, § 7. Transportation company; passes and discounts; forfeiture of office; conflicts of interest

Sec. 7. A transportation company may not grant free passes or discounts to anyone holding an office in this state; and the acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office. A Public Utilities Commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission.

Cal. Const. Art. XII, § 8. Local regulation; exceptions

Sec. 8. A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission. This section does not affect power over public utilities relating to the making and enforcement of police, sanitary, and other regulations concerning municipal affairs pursuant to a city charter existing on October 10, 1911, unless that power has been revoked by the city's electors, or the right of any city to grant franchises for public utilities or other businesses on terms, conditions, and in the manner prescribed by law.

Cal. Const. Art. XII, § 9. Restatement of existing law

Sec. 9. The provisions of this article restate all related provisions of the Constitution in effect immediately prior to the effective date of this amendment and make no substantive change.

June 4, 1999